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No. 94-889

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

IBJ SCHRODER BANK & TRUST COMPANY, as Trustee,

AND

EMPLOYEES' RETIREMENT SYSTEM OF ALABAMA, *et al.*,
Petitioners,

v.

RESOLUTION TRUST CORPORATION, as Conservator for
FRANKLIN SAVINGS ASSOCIATION,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. UNDER THIS COURT'S RECENT RULING IN *FEC v. NRA*, THE COURT OF APPEALS LACKED JURISDICTION OVER THE RTC'S APPEAL, AND THEREFORE THE DECISION OF THE COURT OF APPEALS SHOULD BE VACATED AND THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REINSTATED 2

A. The Holding In *FEC v. NRA* 2

B. The Impact Of *FEC v. NRA* On This Case 3

II. ALTERNATIVELY, THE CASE SHOULD BE REMANDED WITH DIRECTIONS TO THE COURT OF APPEALS TO DETERMINE WHETHER ANY AFTER-THE-FACT AUTHORIZATION OF THE REPUDIATION OCCURRED WITHIN THE STATUTORILY-PRESCRIBED TIME PERIOD 5

TABLE OF CONTENTS

Page

III. THE COURT OF APPEALS' HOLDING THAT THE RTC'S "CUSTOMARY PRACTICE" AUTHORIZED THE OFFICIAL'S REPUDIATION IS IN CONFLICT WITH THIS COURT'S HOLDING IN *FEC v. NRA* 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

Cases

Cook v. Tullis, 18 Wall. 332 (1874) 5

Federal Election Commission v. NRA Political Victory Fund, No. 93-1151 (Dec. 6, 1994) ..... *passim*

Statutes and Regulations

12 U.S.C. § 1441a 3
12 U.S.C. § 1819 3
12 U.S.C. § 1821 6
28 U.S.C. § 518 2,3
28 U.S.C. § 2101 5
28 U.S.C. § 2102 3
Fed. R. App. P. 4 4
28 C.F.R. § 0.20 2

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INTRODUCTION

Petitioners respectfully submit this supplemental brief in support of their Petition for Certiorari, filed November 15, 1994, solely to discuss the impact of this Court's decision in *Federal Election Commission v. NRA Political Victory Fund*, No. 93-1151 (Dec. 6, 1994) ("*FEC v. NRA*"), which was issued after Petitioners filed their Petition for Certiorari in this case. *FEC v NRA* requires vacating the decision of the Court of Appeals and remanding the case to the Court of Appeals for further proceedings, as described below.

I.

UNDER THIS COURT'S RECENT RULING IN *FEC v. NRA*, THE COURT OF APPEALS LACKED JURISDICTION OVER THE RTC'S APPEAL, AND THEREFORE THE DECISION OF THE COURT OF APPEALS SHOULD BE VACATED AND THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REINSTATED

A. The Holding In *FEC v. NRA*

In *FEC v. NRA*, this Court ruled that, under 28 U.S.C. § 518 and 28 C.F.R. § 0.20, absent express statutory authority, a federal agency "is not authorized to petition for certiorari in this Court on its own, and that the effort of the Solicitor General to authorize the [agency's] petition after the time for filing it had expired did not breathe life into it." Opinion at 1.[1] Because the Solicitor General had not filed the

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[1] 28 U.S.C. § 518 provides in pertinent part that, "[e]xcept when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General *shall* conduct and

agency's petition, or timely authorized the agency to do so itself, the petition was a nullity and had to be dismissed for lack of jurisdiction. Moreover, although the Solicitor General had expressly given the agency after-the-fact, retroactive permission to file the petition, this had occurred "after the deadline for filing the petition had passed", *see* 28 U.S.C. § 2102(c). Accordingly, this Court held that the "'after-the-fact' authorization does not relate back to the date of [the agency's] unauthorized filing so as to make it timely." Opinion at 10, 11.

B. The Impact *FEC v. NRA* On This Case

In the present case, pursuant to the same statutory provisions, 28 U.S.C. § 518(b) and 28 C.F.R. § 0.20(b), the RTC was required to obtain authorization from the Solicitor General before filing its notice of appeal in the Court of Appeals.

The Solicitor General did not file the RTC's notice of appeal in the Court of Appeals in this case, and counsel for

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argue suits and appeals in the Supreme Court" and "*may* . . . conduct and argue any case in a court of the United States" in which "the United States is interested." (Emphasis added.) By regulation, the Attorney General has expressly delegated this authority, specifying that certain Government litigation matters are to "be conducted, handled, or supervised by the Solicitor General, in consultation with each agency or official concerned." 28 C.F.R. § 0.20. These matters include "[c]onducting . . . all Supreme Court cases", 28 C.F.R. § 0.20(a), and "determining whether, and to what extent, appeals will be taken by the Government to all appellate courts . . . ." 28 C.F.R. § 0.20(b). The RTC is an agency of the Government for such purposes pursuant to 12 U.S.C. §§ 1441a(b)(1)(B) and 1819(b)(1).

the RTC and the Solicitor General have confirmed that there is no record that the Solicitor General ever authorized the RTC to do so itself. Moreover, it is now too late for the Solicitor General to grant such authority because the time for filing the notice of appeal expired over a year ago.[2] As "'[t]he timing of appealability [has] jurisdictional consequences,' . . . [an] 'after-the-fact' authorization [would] not relate back to the date of the [RTC's] unauthorized filing so as to make it timely." *FEC v. NRA* at 11 (citation omitted).

In sum, because the Solicitor General did not file the notice of appeal in the Court of Appeals or authorize the RTC to do so itself, and because any retroactive authorization granted now would not relate back, the Court of Appeals never had jurisdiction over the RTC's appeal and cannot now obtain it. This Court should therefore grant the Petition, vacate the decision of the Court of Appeals, and remand to the Court of Appeals with instructions to dismiss the appeal.

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[2] The District Court entered judgment on October 12, 1992, A 1446-68, and denied the RTC's motion for relief from the judgment on July 22, 1993. A 1488-1505. The RTC was required to file a proper notice of appeal within 60 days of that latter date, Fed. R. App. P. 4(a)(1).

II.

ALTERNATIVELY, THE CASE SHOULD BE REMANDED WITH DIRECTIONS TO THE COURT OF APPEALS TO DETERMINE WHETHER ANY AFTER-THE-FACT AUTHORIZATION OF THE REPUDIATION OCCURRED WITHIN THE STATUTORILY-PRESCRIBED TIME PERIOD

This Court's opinion in *FEC v. NRA* teaches that "principles of agency law" apply to the Government just as they do to ordinary civil litigants. Opinion at 10. Principles of agency law are of paramount importance in the instant case, which concerns the Official's attempt to exercise a governmental power that had not been vested in him. The RTC, the District Court, and the Court of Appeals all agree with Petitioners that Congress gave the power to repudiate contracts only to the RTC, and that the RTC's bylaws delegated that power to the RTC's Board of Directors and to no one else. Thus, unless the Board's authority to exercise the repudiation power was conferred upon the Official in accordance with the principles of agency law that this Court in *FEC v. NRA* held applicable to the Government, the repudiation was a nullity.

In *FEC v. NRA*, this Court expressly reaffirmed a rule of agency law that the Court of Appeals below overlooked: any attempt to ratify or authorize an unauthorized act must meet the timeliness requirements applicable to the act itself. This Court held that "it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, *but also at the time the ratification was made.*" Opinion at 10 (quoting *Cook v. Tullis*, 18 Wall. 332, 338 (1874) (emphasis in *FEC v. NRA*)).

Thus, in *FEC v. NRA* because "the Solicitor General had authorized the FEC's petition" for certiorari after expiration of the time for filing such a petition, *see* 28 U.S.C. § 2101(c), "[h]is authorization simply came too late in the day to be effective." Opinion at 10.

In the present case, the Court of Appeals found that, although it was undisputed that the repudiating Official lacked authority to exercise the RTC's repudiation power, an "after-the-fact authorization" by the RTC's Board of Directors retroactively cured the defect. The Court of Appeals stated that "the RTC Board of Directors knew and fully approved of [the Official's] exercise of the power of repudiation," and that "there was strong evidence of prejudgment ratification which could have been relied upon by the District Court had it been timely argued by RTC." App. A, 12-13a.

However, the governing statute provides that the RTC may only exercise its repudiation power "within a reasonable period" after it is appointed as conservator. 12 U.S.C. 1821(e)(2).[3] Hence, under this Court's holding in *FEC v. NRA*, if an "after-the-fact authorization" of the Official's original June 8, 1990 repudiation is to be given effect, that authorization would have to have been made within a "reasonable period" of the RTC's appointment as conservator for Franklin on February 16, 1990.

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[3] Moreover, the RTC itself has promulgated an official "Policy Statement" in which it has interpreted the phrase "reasonable period" to mean that the repudiation must be accomplished within 60 days of the RTC's appointment. App. C, 32a.

The Court of Appeals did not make *any* finding concerning *when* the supposed "after-the-fact authorization" of the Official's acts occurred. Indeed, the Court of Appeals did not identify either the acts by which the Board authorized the Official's repudiation of the Bonds or the timing of those acts. The Second Circuit therefore did not consider whether the "after-the-fact authorization" was timely under 12 U.S.C. § 1821(e)(2). Thus, this Court should vacate the decision of the Court of Appeals and remand this case for consideration of the timeliness requirements, enunciated in *FEC v. NRA*, of any supposed authorization event.

III.

THE COURT OF APPEALS' HOLDING THAT THE RTC'S "CUSTOMARY PRACTICE" AUTHORIZED THE OFFICIAL'S REPUDIATION IS IN CONFLICT WITH THIS COURT'S HOLDING IN *FEC v. NRA*

Although it is undisputed that the RTC's Board never expressly delegated its authority to repudiate contracts to the Official, the Court of Appeals found that the Board either impliedly subdelegated its power to the Official or impliedly ratified his action. App. A, 13a.[4] In so finding, the Court of Appeals made unsupported assumptions about the RTC's "customary practices" and litigation history.

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[4] As set forth in the Petition, no party argued at trial that the repudiation had been impliedly authorized or impliedly ratified. No evidence was adduced at trial on these issues, and there was no basis in the record to support the Court of Appeals' "findings". (In fact, the only evidence is directly contrary. See Petition at 15-17.) The District Court made no findings of fact with respect to any of these issues, which were not raised at trial.

However, in *FEC v. NRA*, this Court came to the opposite conclusion on very similar facts, ruling that a governmental agency's customary practice or litigation routine cannot substitute for an express delegation of authority, especially where the exercise of that authority previously has not been challenged. In *FEC v. NRA*, the Federal Election Commission argued that it had represented itself repeatedly before this Court -- in essence that an implied subdelegation of the Solicitor General's authority could be inferred from the FEC's customary practice of litigating independently in this forum. This Court rejected that argument, noting that it was not "impressed by the FEC's argument that it has represented itself before this Court on several occasions in the past without any question having been raised regarding its authority to do so." Opinion at 8.

Likewise, in the present case, no one ever before had challenged the Official's authority to repudiate a contract -- much less his authority to repudiate a $2.9 billion bond issue. Thus, the Second Circuit's finding that the RTC's supposed customary practice or litigation routine somehow authorized the Official to take an action expressly reserved to the RTC's Board of Directors is inconsistent with this Court's holding in *FEC v. NRA*. At a minimum, the Petition should be granted and the case remanded for reconsideration by the Second Circuit in light of *FEC v. NRA*.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, Petitioners respectfully request that this Court grant the Petition for Certiorari, vacate the decision of the Court of Appeals, and remand with instructions to dismiss the RTC's appeal. Alternatively, the Petition should be granted and the case remanded for further consideration in light of *FEC v. NRA*.

December 28, 1994

Respectfully submitted,

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SUPPLEMENTAL BRIEF

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PETITIONERS HAVE MADE A MOTION FOR RELIEF FROM THE COURT OF APPEALS' JUDGMENT

Petitioners respectfully submit this supplemental brief in support of their Petition for Certiorari, filed November 15, 1994, to inform the Court that Petitioners have made a motion to the Court of Appeals for relief from the Court of Appeals' Order. Petitioners have made this motion to the Court of Appeals because it has only recently become apparent that the Resolution Trust Corporation did not file a timely notice of appeal from the judgment of the District Court for the plaintiffs. Thus, the Court of Appeals did not have jurisdiction to review the District Court's decision. Petitioners have requested that the Solicitor General consent to a remand for this purpose, but that request has thus far been denied.

Petitioners have already informed this Court of jurisdictional defect in their Supplemental Brief dated December 28, 1994. That brief was submitted to make this Court aware of the ramifications of one of its recent decisions, *Federal Election Commission v. NRA Political Victory Fund*, No. 93-1151 (Dec. 6, 1994) (*"FEC v. NRA"*), on the instant case. However, Petitioners believe that it is more appropriate for the Court of Appeals to consider the issue of its own jurisdiction in the first instance and thus

respectfully submit that this Court should not consider this issue until the Court of Appeals has had an opportunity to rule.

February 24, 1995

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